

**United States Department of Labor
Employees' Compensation Appeals Board**

M.S., Appellant

and

**U.S. POSTAL SERVICE, DISTRIBUTION
CENTER, Des Moines, IA, Employer**

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**Docket No. 12-234
Issued: May 21, 2012**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 21, 2011 appellant filed a timely appeal of a September 29, 2011 nonmerit decision and a July 22, 2011 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to consider the merits of the case.

ISSUES

The issues are: (1) whether appellant has met her burden of proof to establish that she developed a bilateral arm condition due to factors of her federal employment; and (2) whether OWCP properly denied appellant's request for reconsideration on the merits pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On January 12, 2011 appellant filed a notice of recurrence alleging on November 29, 2010 she developed arm symptoms causally related to her June 21, 1996 employment injury while in her position as a transitional multi-position letter sorting machine operator (MPLSM); OWCP File No. xxxxxx614.² In an e-mail dated February 18, 2011, appellant's supervisor indicated that appellant began working as a mail handler and that this was a new position.

In a report dated January 11, 2011, Dr. Eugene J. Cherny, a Board-certified plastic surgeon with a subspecialty in hand surgery, diagnosed bilateral carpal tunnel syndrome and bilateral pronator syndrome. He also found evidence of compression of the left ulnar nerve at the elbow. Dr. Cherny recommended surgery.

OWCP informed appellant on March 7, 2011 that her claim should be developed as a new occupational disease rather than a recurrence of disability because she was claiming new exposure and different employment factors, *i.e.*, transferred to a mail handler position, *a.k.a.*, high speed tray sorter. OWCP requested additional factual and medical evidence by letter dated March 11, 2011 and allowed 30 days for a response. Appellant responded on April 1, 2011 and stated that she began her new position on August 28, 2010. She stated that she was a high speed tray sorter which required repetitive lifting of trays, loading and unloading a conveyor belt. Appellant stated that she was required to lift 10,000 trays per shift and that she worked up to 12 hours a day.

By decision dated April 20, 2011, OWCP denied appellant's claim finding that she failed to submit the necessary medical evidence to establish a causal relationship between her diagnosed condition and her implicated employment duties.

Appellant requested reconsideration on April 27, 2011. She submitted a report dated March 29, 2011 from Dr. Cherny diagnosing bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, bilateral ulnar tunnel syndrome as well as bilateral pronator syndrome. Dr. Cherny noted that appellant had developed employment-related carpal tunnel syndrome 12 years previously at the employing establishment. He stated that appellant began a new job in August 2010 which required the use of different machines, a different layout and new specific duties. Dr. Cherny stated that appellant's symptoms of upper extremity compression neuropathies became aggravated once again. He stated that appellant's diagnosed conditions were causally related to her employment due to the repetitive nature of her job including reaching to all levels, frequent grasping, twisting and pinching. In a note dated March 26, 2011, Dr. Cherny repeated his diagnoses. On June 2, 2011 he reported appellant's increased upper extremity pain. Dr. Cherny recommended surgery.

By decision dated July 22, 2011, OWCP reviewed the merits of appellant's claim and denied modification of the April 20, 2011 decision. It found that Dr. Cherny's reports were

² Appellant filed a claim in 1996 for bilateral carpal tunnel syndrome that was accepted by OWCP (File No. xxxxxx614). Her temporary position was terminated but appellant was rehired by the employer. OWCP also accepted a back condition in 2009 (File No. xxxxx162). Due to the back claim, appellant was off work for significant periods from August 28 to December 8, 2010.

based on an improper factual background as he did not indicate that he was aware that appellant did not work from July 20, 2009 through August 13, 2010 and that she began working in her new position on August 14, 2010. OWCP also listed 21 intermittent dates that appellant missed work between August 28 and December 10, 2010 and stated that, as Dr. Cherny did not mention these dates, his opinion was based upon an incomplete and inaccurate factual and medical background and was of diminished probative value.

Appellant requested reconsideration on August 3, 2011 and listed her employment with the employing establishment beginning in 1993. She stated that she stopped work in July 2009 due to an accepted back injury and returned to work on August 30, 2010 at a new location.

By decision dated September 29, 2011, OWCP declined to reopen appellant's claim for reconsideration of the merits on the grounds that she failed to submit the necessary medical evidence to support her claim.

LEGAL PRECEDENT -- ISSUE 1

To establish that an injury was sustained in the performance of duty in an occupational disease claim, a claimant must submit the following: (1) medical evidence establishing the presence or existence of the disease or condition for which compensation is claimed; (2) a factual statement identifying employment factors alleged to have caused or contributed to the presence or occurrence of the disease or condition; and (3) medical evidence establishing that the employment factors identified by the claimant were the proximate cause of the condition for which compensation is claimed or, stated differently, medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon a complete factual and medical background, showing a causal relationship between the claimed condition and identified factors. The belief of a claimant that a condition was caused or aggravated by the employment is not sufficient to establish causal relation.³

ANALYSIS -- ISSUE 1

Appellant alleged that she sustained a recurrence of disability as she developed symptoms from her previously accepted condition of carpal tunnel syndrome. OWCP noted that she began a new position in August 2010 and stated that, as she was exposed to additional work duties, her claim should be more appropriately developed as a new occupational disease claim.⁴ The Board finds that as appellant attributed her current upper extremity condition to her new position as a high speed tray sorter requiring repetitive lifting of trays, loading and unloading a conveyor belt with lifting up 10,000 trays per shift, she has new work exposure which requires development as an occupational disease claim.

³ *Lourdes Harris*, 45 ECAB 545, 547 (1994).

⁴ Section 10.104 of OWCP's regulations provide that a notice of recurrence should not be filed when a new injury, new occupational disease, or a new event contributing to an already existing occupational disease has occurred. In these instances, the employee should file Form CA-1 or CA-2. 20 C.F.R. § 10.104.

Appellant has submitted evidence of diagnosed medical conditions including bilateral carpal tunnel syndrome, bilateral cubital tunnel syndrome, bilateral ulnar tunnel syndrome as well as bilateral pronator syndrome. She has also identified the employment duties which she felt caused or contributed to her condition as listed above. In order to meet her burden of proof, appellant also must submit medical evidence establishing that the diagnosed condition is causally related to the employment factors identified by the claimant. She has submitted a report from Dr. Cherny dated March 29, 2011 in which he provided detailed diagnoses, noted her history of employment-related carpal tunnel and stated that she began a new job in August 2010. Dr. Cherny stated that this new position required the use of different machines, a different layout and new specific duties. He stated that appellant's symptoms of upper extremity compression neuropathies became aggravated once again. Dr. Cherny stated that appellant's diagnosed conditions were causally related to her employment due to the repetitive nature of her job including reaching to all levels, frequent grasping, twisting and pinching.

While these reports are not sufficient to meet appellant's burden of proof to establish her claim, they raise an uncontroverted inference between appellant's carpal tunnel and upper extremity conditions and the identified employment factors of reaching, grasping and twisting and are sufficient to require OWCP to further develop the medical evidence and the case record.⁵ The employing establishment was provided an opportunity to respond to appellant's claim, but they did not dispute she performed the duties she alleged.

On remand, OWCP should prepare a statement of accepted facts and refer appellant to an appropriate physician for a detailed opinion on the causal relationship between her diagnosed upper extremity conditions and her new employment duties. After this and such other development as it deems necessary, OWCP should issue a *de novo* decision.⁶

CONCLUSION

The Board finds that this case is not in posture for decision and requires additional development of the medical evidence by OWCP.

⁵ *E.J.*, Docket No. 09-1481 (issued February 19, 2010); *Virginia Richard (Lionel F. Richard)*, 53 ECAB 430 (2002); *Jimmy A. Hammons*, 51 ECAB 219 (1999); *John J. Carlone*, 41 ECAB 354 (1989).

⁶ Due to the disposition of this issue it is not necessary to address whether OWCP properly declined to reopen appellant's claim for reconsideration of the merits on September 29, 2011.

ORDER

IT IS HEREBY ORDERED THAT the September 29 and July 22, 2011 decisions of Office of Workers' Compensation Programs are set aside and remanded for further development consistent with this decision of the Board.

Issued: May 21, 2012
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board